21253

Supreme Court of the United States,

MARTHA RAPHAEL, as Administratrix of the Estate of NATHANIEL W. RAPHAEL, deceased,

Appellant,

AGAINST

SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, CHARLES J. PEABODY and ACOSTA NICHOLS,

Appellees.

Number 229.
October, 1903.

Mem. for Appellees upon Appellant's Motion to Advance Cause.

The Appellees respectfully submit that this cause ought not to be advanced, and for the reason, among others, stated in the accompanying affidavit of Mr. Wm. Mason Smith. If the decree against the Appellant in the original suit shall be affirmed in the United States Circuit Court of Appeals which, in December next, is to hear the appeal from it, the present suit would be of necessity ended, since it is brought only to recover from a fund alleged to be in the hands of the Appellees to meet the anticipated or supposititious recovery in the suit thus to be heard in the United States Circuit Court of Appeals. It is submitted that in no case should the Appellees be put to the expense or trouble of arguing the present appeal in this Court, while the Utah judgment bars any recovery here; but that the Appellant here should wait here until her appeal from the conclusive decree in the Utah suit should be heard, as it will be in December next, and decided.

The Appellees respectfully insist upon an oral argument of this cause if and when it shall be brought on in this Court. It is true that the cause comes to the Court upon the question of the jurisdiction of the Court below. But that question in large part involves the whole of the controversy. No jurisdiction was claimed below by reason of diversity of citizenship. It was claimed solely on the ground that the suit was ancillary to the bill against the Rio Grande Western Railway Company in the Federal Court in Utah. The Court below held that by reason of the facts the suit was not ancillary. When the case shall be presented to this Court, that question will need to be argued.

It is submitted that the motion should be denied.

New York, October 12th, 1903.

EDWARD M. SHEPARD,
Of Counsel for the Appellees.

SUPREME COURT OF THE UNITED STATES.

MARTHA RAPHAEL, as Administratrix of the Estate of NATHANIEL W. RAPHAEL, deceased,

Appellant,

vs.

SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, CHARLES J. PEABODY and ACOSTA NICHOLS,

Appellees.

Number 229. October, 1903.

UNITED STATES OF AMERICA,
State of New York, } ss.:
County of New York,

WILLIAM MASON SMITH, being duly sworn, says: I am one of the solicitors and of counsel for the Appellees in this suit. It was brought in the Court below to reach a fund alleged to be in the hands of the Appellees and to be there applicable to meet a claim which the original Appellant, Nathaniel W. Raphael, had sued to recover from the Rio Grande Western Railway Company. The complainant claimed that the present suit was ancillary to such former suit. Such former suit was brought in January, 1901, in the Circuit Court of the United States for the District of Utah against the Rio Grande Western Railway Company and others, but not against any of the Appellees in this suit. A large amount of testimony was taken in that suit and in June, 1902, a final decree was made dismissing the bill of compiaint upon the merits. From that decree an appeal was taken which is now set for hearing before the Circuit Court of Appeals for the Eighth Circuit in December next. The Appellant, Nathaniel W. Raphael, in his life time declined, and his successor in interest has since his

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903,—No. 229.

MARTHA RAPHAEL, Administratrix of the Estate of NATHANIEL W. RAPHAEL, Deceased,

Appellant,

VERSUS

SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, CHARLES J. PEABODY, and ACOSTA NICHOLS,

Appellees.

Brief for Appellees.

Appeal from a decree of the Circuit Court of the United States for the Southern District of New York dismissing the complainant's bill for want of jurisdiction.

The original complainant, Nathaniel W. Raphael, brought this suit, in the Circuit Court of the United States for the Southern District of New York, against the defendants constituting the banking firm of Spencer Trask & Co., bankers, to

restrain them from selling certain shares of the common capital stock of the Rio Grande Western Railway Company until, out of the proceeds of sale, a fund should be deposited in a Trust Company to satisfy a claim which the complainant was asserting against the Railway Company by suit in the Circuit Court of the United States for the District of Utah.

Bill, prayer for relief, *p.* 8.

Since the decree below was made and the appeal from it taken by the original complainant, he has died, and the administratrix of his estate substituted as appellant in his place.

The bill alleged that the complainant was a citizen of New Jersey and that the defendants were citizens of New York and of the Southern District of New York (*p.* 1).

The defendants, specially appearing, filed a plea to the jurisdiction, averring that, while the plaintiff was, as he alleged, a citizen of New Jersey, the defendants Edwin M. Bulkley and Charles J. Peabody were, at the commencement of this suit, likewise citizens of New Jersey and, for more than eight years prior to such commencement had been, (plea, *p.* 90). The complainant brought the cause on for argument upon the bill of complaint and the plea (Recital in decree, *p.* 94); and thereupon a decree was made by the court below dismissing the bill with costs.

Decree, *p.* 95.

The court below also certified to this Court the following question:

> "Is this court (the Circuit Court) without "jurisdiction of this cause for the reason that "the bill of complaint is not ancillary to the "suit pending in the United States Circuit "Court for the District of Utah and because "the defendants Edwin M. Bulkley and "Charles J. Peabody are citizens of the same "state as the complainant and are necessary "parties defendant to this action."

The opinion of the court below directing a dismissal was filed on 29th August, 1902; but the decree of dismissal was not granted until 15th November, 1902 (*p.* 94). Between the rendering of the decision and the entry of the decree the complainant moved for leave to amend his bill; and the present record contains the moving papers and the papers of the defendants in opposition, the opinion of Judge Coxe, and his order denying the motion (*pp.* 95-120). With these papers we do not understand that we are here concerned. The present appeal is taken from the decree of dismissal; nor did the complainant in his assignments of error refer to the denial of his motion to amend.

Petition of appeal and order allowing it, *pp.* 122, 123.
Assignment of Errors, *pp.* 123, 124.
Citation, *p.* 127.

FACTS.

The substance of the allegations of the bill was as follows:

That the complainant on 7th January, 1901, filed a bill of complaint in the Circuit Court for the District of Utah against the Wasatch & Jordan Valley Railway Company (called the *Wasatch* Company) and the Rio Grande Western Railway Company (called the *Western* Company) and others to foreclose a mortgage given by the Wasatch Company to secure a series of its alleged mortgage bonds of which the plaintiff claimed to be the owner of $579,000 in par value with overdue interest thereon for nearly twenty years to the amount of $825,976.83, making a total of principal and interest of $1,404,970.83 (*p.* 19);

That the property alleged to be mortgaged consisted of two spurs of the main line of the *Western* Company in Utah; That The Western Company and its predecessor, the Denver & Rio Grande Western Railway Company (called the *Old Western* Company) had acquired the property through foreclosures of mortgages prior to the alleged mortgage under which the complainant claimed; That there were irregularities or invalidities in such foreclosures of prior mortgage; that the *Western* Company was, therefore no more than a mortgagee in possession; and that the complainant in such Utah suit had asked a foreclosure of his alleged mortgage and an accounting by the *Western* Company, as a mortgagee in possession, for rents and profits.

Bill, *p.* 2.

Bill in Utah suit appended to the bill in this suit, *pp.* 17-29.

That in such Utah suit the *Western* Company had filed its answer on 25th April, 1901, a copy of which was annexed to the present bill (*pp.* 42-62).

That complainant had applied to Judge *Thayer* of the Eighth Circuit for the appointment of a receiver of such spurs of railroad, and that such motion was heard upon the bill in that suit and certain affidavits, documents and depositions, copies of which were appended to the bill (*p.* 30. Documents and Depositions, *pp.* 42-80).

> NOTE: A large part, however, of the affidavits and depositions annexed to the present bill and alleged in it are not printed (Index, *pp.* II-IV).
>
> There is no allegation in the bill affirming the truth of the statements contained in the papers submitted to Judge THAYER by the complainant or by the defendants in the Utah suit (Bill, *pp.* 2-3). It is only the fact that such statements were made in such papers,—not the truth of the statements, which was put before the court below, or is before this Court.

That on 6th April, 1901,—that is to say, after the filing of the complainant's bill in the Utah suit and after he had made his motion for a receiver,—the present defendants, constituting the banking firm of Spencer Trask & Co., carrying on business at the City of New York, published an advertisement in which they stated that they had, in behalf of the holders of more than ninety per cent. of the common stock of the *Western* Company, negotiated the sale of that stock with other property to representatives of the Denver & Rio Grande Railroad Company; that they had secured the right to include in the contract all the outstanding common stock of the *Western* Company

(that is to say, the small minority not included in the "more than ninety per cent." which the defendants already owned or represented); that such outstanding common stock must come in on the same terms as the stock already represented by them; and that the advertisement contained this statement (*p.* 4):

> "Since the commencement of the negotia-
> "tion, one Raphael has instituted in the
> "United States Circuit for Utah a suit against
> "the title of the Western Company to the
> "Bingham and Alta spurs of its railroad;
> "and in making the contract for the vendors
> "our firm gave its personal guarantee against
> "any liability of the Company in that suit.
> "Although the Company's solicitors are con-
> "fident of success, it is proper that our guar-
> "antee be ratably shared by all who avail
> "themselves of the contract made by us with
> "the vendors. From the $80 per share and
> "interest mentioned above we shall, there-
> "fore deduct such amount per share as coun-
> "sel shall advise us will amply protect us
> "upon such guarantee. Such amount will be
> "held in a special trust."

That the defendant George Foster Peabody in an affidavit in opposition to the motion for a receiver (*p.* 7),

> "*says* that the provision for a fund to be
> "created out of the sale of the shares of the
> "capital stock of the Rio Grande Western to
> "the Denver & Rio Grande Western is to be
> "left in the control of Spencer Trask & Com-
> "pany to be held in trust as a greater assur-
> "ance that if complainant's claim shall be es-
> "tablished, it will be paid."

That Judge THAYER denied the complainant's motion in the Utah suit for a receiver, and that the Utah suit (*p.* 7)

> "is pending and undetermined and that if "the scheme of Spencer Trask & Co. is "allowed to be carried out * * * it "will hinder and delay your Orator in the "prosecution of his said suit in Utah."

The passage in Mr. Peabody's affidavit to which reference in the bill is made, appears at *pp.* 73, 74, of the record, the affidavit being one of the papers annexed to the present bill of complaint. It is as follows:

> "One stipulation of the agreement for the "sale of common stock of the Rio Grande "Western Railway Company made by my "banking firm of Spencer Trask & Company is "that my said firm shall guarantee the pur- "chaser against any claim of the complainant "in this suit. The statement in that respect "contained in the circular letter of my firm "to the holders of the common stock of that "Company, of which one of such cuttings is a "copy, is as follows:
>
> " 'Since the commencement of the negotia- " 'tion one Raphael has instituted in the " 'United States Circuit Court for Utah a " 'suit against the title of the Western Com- " 'pany to the Bingham and Alta spurs of " 'its railroad; and in making the contract " 'for the vendors our firm gave its personal " 'guarantee against any liability of the com- " 'pany in that suit. Although the company's " 'solicitors are confident of success, it is " 'proper that our guaranty be ratably

"'shared by all who avail themselves of the
"'contract made by us for the vendors. From
"'the $80 per share and interest mentioned
"'above we shall, therefore, deduct such
"'amount per share as counsel shall advise
"'us will amply protect us upon such guaran-
"'tee. Such amount will be held in a special
"'trust.'

"The *result* of this provision is that if the "complainant have any just claim, its pay-"ment is secured not only by the great excess "of the assets of the Rio Grande Western "Company itself over its debts, but also by a "special amount to be held in trust. I am "advised by the counsel of the Western Com-"pany that such provision is a fact against, "and not in favor of, the complainant's mo-"tion, as it gives a greater assurance that, if "the complainant's claim shall be established, "it will be paid.

"The statement of the said Raphael in his "affidavit that the retention of a fund to in-"demnify my said firm for their proposed "guaranty against complainant's claim, is an "attempt on the part of the Western Com-"pany to hinder and delay the complainant, "is unqualifiedly false. The Western Com-"pany is in no way a party to the agreement "or provision for such indemnity or such "guaranty. The Western Company, if the "purchase of its common stock shall be com-"pleted, will be itself indemnified against any "claim of complainant."

The whole of the complainant's imaginary cause of action was, on the argument below, made to turn upon such statement of Mr. Peabody as to the *result* of the indemnity which his firm had taken

from the holders of common stock coming into the sale negotiated by them, to protect themselves against the guaranty that they had given the purchasers of the common stock against the complainant's claim in the Utah suit. Such *result,* so Mr. Peabody stated his opinion, was that not only was the payment of the complainant's claim in the Utah suit,—if there were any such valid claim,—assured by the assets of the *Western* Company, which was the alleged debtor,—but that such claim was also secured by the liability which the defendants had assumed to the purchasers of the common stock to provide against the claim, and by the fact that Spencer Trask & Company had taken security from the vendors of the common stock to indemnify them, Spencer Trask & Company, against their liability on the guaranty.

Obviously what Mr. Peabody meant was,—not that his firm had assumed any contract or trust relation to complainant,—but that the liability his firm had assumed to the purchasers of the common stock, and the security they were taking, created assurance, in addition to the responsibility of the Western Company, that the complainant's claim, if void, would be established. The complainant thus sought to turn a guaranty of Spencer Trask & Company, inserted in the agreement for sale of the common stock in order to protect the purchasers from the loss which would follow complainant's successful assertion of his claim, and the subsequent attempt of Spencer Trask & Company to secure from their customers indemnity against their own liability on such guaranty,—into a stipulation for complainant's benefit,—and

that, although it was obvious that he was in no manner of sense whatever a party to the sale of the common stock, or to any arrangement between Spencer Trask & Co. and their vendees or their customers.

The bill expressly alleged that the present defendants were "not parties to the suit pending in "Utah," and that there was "no agreement exist-"ing between complainant and the other holders "of outstanding bonds similar to complainant's "bonds" and Spencer Trask & Company by which the said proposed fund should "be applied to-"wards the satisfaction of complainant's bonds" (*p.* 7). The bill further alleged,—

"That if said consolidation as set forth in the "scheme contemplated by the advertisements re-"ferred to is allowed to be carried out without "some stipulation between your orator and the "members of said firm of Spencer Trask & Com-"pany as to the custody of said fund proposed to "be created as aforesaid, the rights of remote pur-"chasers of the mortgaged premises upon which "complainant claims a lien will have intervened "pending complainant's suit in Utah so that if "complainant succeeds at the final hearing of his "suit in Utah, it will require the bringing into "the suit as defendants such remote purchasers "as the Denver & Rio Grande Western Railway "Company and their proposed successors" (*pp.* 7, 8).

And also that the present defendants, when they obtained an option upon the shares of the common stock of the *Western* Company which they were selling, had notice of the complainant's suit in Utah against the *Western* Company and that "the se-

"curement of said option from said vendors by "the said firm of Spencer Trask & Co. was in dis- "regard of complainant's right and to prevent the "mortgaged premises to remain *in statu quo* until "the final hearing of a suit in Utah."

Such is the bill of complaint. Judge THOMAS in the court below found no difficulty in sustaining the defendants' plea to the jurisdiction. It was obvious that, as two of the defendants were citizens of the same State with the complainant, the court had no jurisdiction unless the present bill could be treated as one ancillary to the bill in the Utah suit. But Judge THOMAS thus disposed of the latter theory in his opinion (*p.* 93):

"The defendants in the second suit are in no "wise related to the cause of action in the first "suit; they hold no property of the obligated cor- "porations; they may not be asked to discharge "the judgment, or to render any account looking "to its payment; they have made no agreement "with the complainant, or that enures to him. They "chanced to be dealers, on their own account, or "that of others, in nowise in privity to any party in "the first suit, in the stock of a company whom "the complainant hopes to show has no better "title to the railway than that of earlier mort- "gagees in possession; and yet the complainant "asks to restrain the transfer of such stock lest "the mortgaged premises should not remain '*in* "'*statu quo* until the final hearing of complain- "'ant's suit in Utah.'

"Under neither bill is any demand for any re- "lief made against the stockholders, no process "could run against them in case of favorable judg- "ment in the first suit, and it would be indifferent "to the complainant where or by whom the stock

"was held. Spencer Trask & Co. are entire "strangers to them and to all persons owing them "any duty, and no fund reserved by that firm be- "longs to complainant or could be reached by him, "nor is such relief asked. The entire absence of "privity between the parties in the second suit to "any and all parties in the first suit or to the sub- "ject-matter thereof; the entire absence of any "duty from the defendants personally or as trus- "tees to the complainant, forbids even the sug- "gestion that this suit is ancillary in its nature."

The present record discloses that, upon final hearing, the complainant's bill in the Utah suit was dismissed, the court there finding that the complainant had purchased his five hundred and seventy-nine bonds when they were about twenty years in default, paying less than $2 for each $1,000 bond with twenty years' interest accumulated; that the complainant was not a purchaser in good faith or for value; and that there was nothing fraudulent or irregular in the foreclosure under which the *Western* Company acquired its title.

Opinion of Judge ADAMS, *pp.* 111-116.

The complainant having brought on the cause for argument (Decree, *p.* 94) upon his bill of complaint and upon the plea,—the allegations of the plea had to be taken as admitted; and the complainant is in the position of demurring to the plea.

Farley v. *Kitson*, 120 U. S., 303, at *p.* 314.
Rhode Island v. *Massachusetts*, 14 Peters, 210, at *p.* 257.

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Argument.

I.

The Court below had no jurisdiction because the defendants Bulkley and Charles J. Peabody were co-citizens with the complainant of the State of New Jersey.

As the federal jurisdiction here depends upon diverse citizenship, and as the controversy is indivisible, all of the parties on one side must be of a citizenship diverse from all of the parties on the other side.

Blake v. *McKim*, 103 U. S., 336.
Anderson v. *Watt*, 138 U. S., 694, 702.

It was argued below that, as the defendants are copartners and some of them citizens of New York, the suit may proceed against the latter, ignoring their copartners who are co-citizens of the State of New Jersey with the complainant. But this, it is submitted, is not the law.

The purpose of the suit,—the very judgment prayed,—is the restraint of the defendant firm from selling shares of the capital stock of the Rio Grande Western Company belonging to themselves, and shares of the same company belonging to those whom they represent and to whom they

are liable, unless the firm "shall agree to turn over "to some Trust Company in the City of New York "at and before the completing of said sale of said "shares a sum of money which may be determined "by this court out of the proceeds of such sale." That is to say, the effort is to take from the defendant firm moneys belonging to them and other moneys which they hold for others and for which they are liable to others. No one of such other persons has been made a party.

Every member of the firm is directly (and, indeed, so far as appears, equally) interested in the result of the suit. Every member of the firm is a necessary party,—not merely a proper party, but an absolutely necessary party. Any judgment must affect the property rights of every member of the firm. The court below could not deal with the questions involved unless and until it should have every member of the firm before it. Until then the court could not take cognizance of the cause. Nor, unless it had or might lawfully have jurisdiction of all the parties, was the cause within its jurisdiction. Upon this the authorities are clear.

Stone v. *South Carolina,* 117 U. S., 430: The suit was originally brought by the State of South Carolina in its own court to recover moneys in the hands of two partners, Corbin and Stone. Stone sought to remove the cause to the federal court on the ground that, although his partner was a citizen of South Carolina, he himself was a citizen of New York, and that the presence of his co-defendant, being such citizen of South Carolina, was

not essential to a final determination of the controversy, so far as he was concerned. This COURT, however, denied, the federal jurisdiction, saying, by WAITE, *C. J.*, at p. 433:

> "The cause of action is joint, and only one "of the defendants petitions for removal. "* * * Neither is there any separable "controversy in the case, such as might, if the "necessary citizenship existed, allow Stone "alone to remove the suit without joining "Corbin with him in the petition for removal. "The money sued for was received by the de- "fendants as partners; and they are liable "jointly for its payment if they are liable at "all."

Bell v. *Donohoe*, 17 Fed. Rep., 710: The bill was filed to set aside a conveyance made to one member of a partnership of property acquired by him in his individual name, but in behalf of the partnership. His copartner was not made a party to the suit. The defendant's demurrer was sustained, the court saying by SAWYER, *J.*:

> "Kelly, in my judgment, is an indispensable "party to the bill without whose presence no "decree can properly be made. * * * No "decree could finally settle the rights of "Donohoe and Kelly or complainant without "the presence of Kelly. Donohoe is as much "entitled to have his rights finally determined "in the case as the complainant. The case "is, in my judgment, clearly within the prin- "ciple established in *Shields* v. *Barrow*, 17 "How., 139; *Barney* v. *Baltimore*, 6 Wall., "280; *Burke* v. *Flood*, 6 Sawy., 220 [s. c., 1 "Fed. Rep., 541], by Mr. Justice Field in *C.*

"*S. Min. Co.* v. *V. & G. H. W. Co.*, 1 Sawy., "687; and in *Ribon* v. *Railroad Co.*, 16 Wall., "450. It is difficult to perceive how partner- "ship rights can be finally determined as to "anybody without the presence of all the part- "ners * * * As Kelly is a citizen of the "same state with complainant, making him a "party would doubtless oust the jurisdiction "of the court."

Duchesse d'Auxy v. *Porter*, 41 Fed. Rep., 68: The suit was by the administrator of a deceased partner against three surviving partners, two of whom were citizens of the same State as the complainant. The court decided that there was no federal jurisdiction, notwithstanding section 737 of the Revised Statutes, which permitted the Court to proceed against parties properly before it, though some of the defendants were not within the district, and could not be served with process, saying by SHIPMAN, *J.*:

"It is well settled that this section does not "require a court to entertain or continue juris- "diction of a suit, especially in equity, where "non-resident defendants are parties of such "importance that complete justice cannot be "done between the parties to the suit without "their presence, and they have not voluntarily "appeared. * * * It has furthermore been "held that the section 'does not affect any case "where persons having an interest are not "joined because their citizenship is such that "their joinder would defeat the jurisdiction.' "*Shields* v. *Barrow*, 17 How., 130; *Barney* v. "*Baltimore City*, 6 Wall., 285; *Jones* v. *An-* "*drews*, 10 Wall., 327; *Lovejoy* v. *Washburne*,

> "1 Biss, 416. This case comes within the "principle which the Supreme Court has been "careful to announce in the cited cases, be- "cause the accounting must necessarily in- "volve the pecuniary partnership relations of "the absent partners with the late firm of " Soutter & Co. and with the complainant."

Adams v. *May*, 27 Fed. Rep., 907: Here it was held that, where, upon an application for removal to the federal court, it was simply alleged that the defendant firm was a resident of a different State from the plaintiff, the diverse citizenship was not sufficiently alleged, but that the citizenship of each and every partner must be alleged so as to show that no one of them is a citizen of the same State as the plaintiff. The Court said by LOVE, *J.*:

> "The individual names of the partners must "be set out, and citizenship alleged of each "and every of them. The state statute "authorizing suits to be brought in the part- "nership name is inapplicable here. No doubt "a cause commenced in a state court in the "firm name, without giving the individual "names, may be removed to this court; but "the petition for removal should state the in- "dividual names and citizenship of the mem- "bers of the firm, and show that no one of "them is a citizen of the same state with an "adversary party in the controversy. * * * "For aught that we can see, some member or "members of the firm of Adams & Co. may be "citizens of the same State with the defend- "ants."

Mason v. *Eldred*, 6 Wall., 231, 235: This COURT said, by FIELD, *J.*:

> "But in copartnerships there is no such sev-
> "eral liability of the copartners. The co-
> "partnerships are formed for joint purposes.
> "The members undertake joint enterprises,
> "they assume joint risks, and they incur in all
> "cases joint liabilities. In all copartnership
> "transactions this common risk and liability
> "exist. Therefore it is that in suits upon these
> "transactions all the copartners must be
> "brought in, except when there is some
> "ground of personal release from liability, as
> "infancy or a discharge in bankruptcy; and
> "if not brought in, the omission may be plead-
> "ed in abatement."

Nor is this a matter of service of process. The defendants could not, if they would, consent to and thereby confer jurisdiction of a suit brought by a complainant of like citizenship with them. The point would be taken by the Court itself against consent of all the parties,—and even in this Court on appeal.

> *Anderson* v. *Watt,* 138 U. S., 694, 702.
> *Morris* v. *Gilmer,* 129 U. S., 315, 325.

The question is entirely different from that which arises where the cause is justiciable by the Court against all the members of the firm, but where only one of them is served. A defendant who is made a party, and against whom the Court may take jurisdiction, and who can, if he will, come in to protect himself, may, as to partnership assets, be concluded by a judgment obtained after service on his copartners. The state courts and the federal courts alike will permit a judgment against a

copartnership binding partnership assets and against the partner actually served binding him individually.

Barney v. *Baltimore City,* 6 Wall., 280-287.
Hall v. *Lanning,* 91 U. S., 160, 166-169.

Simonds v. *Speed,* 6 Richardson (S. C.), 390: It was here expressly held under an act which permitted judgment against a firm after service on one partner, that all the partners must be made defendants.

The general rule that every member of a firm must be a party to a suit affecting rights or property of the firm has never been doubted.

Marvin v. *Wilber,* 52 N. Y., 270.
Woodhouse v. *Duncan,* 106 N. Y., 527, 534.
Wooster v. *Chamberlin,* 28 Barb., 602.

II.

The bill cannot be sustained as an ancillary or supplemental bill or as a bill otherwise not original.

This was the principal contention of the complainant upon the argument. An ancillary bill must from its very nature be filed in the same court as the original bill, and against the same

parties, or their assignees or privies in interest, and with reference to the same subject-matter.

Story on Equity Pleading, 10th ed., §§326-342.
Christmas v. *Russell,* 14 Wall., 80.
Marshall v. *Holmes,* 141 U. S., 599.
McDonald v. *Seligman,* 81 Fed. Rep., 753.
Dunn v. *Clarke,* 8 Pet., 1.
Root v. *Woodworth,* 150 U. S., 401, 411.
Daniels Chancery Practice, 6th Am. Ed. (references to original paging) vol. I, pp. 305, 306; vol. II, pp. 1515-1547.
Encyclopædia of Pleading & Practice: Definition of "bills not original" in article on "Bills in Equity" in vol. 3 at p. 339; Article on "Supplemental Pleadings" in vol. 21 at p. 4 *et seq.*

The present suit is brought in a different court from the original suit, and against entirely different parties. No one of the present defendants is a defendant in the original suit or a representative through assignment or otherwise of any defendant in that suit. No one of the defendants in the original suit is a defendant here, or represented by any defendant here.

Nor is the bill ancillary in its nature. It contains no allegation whatever of any ancillary or supplementary agreement between the complainants and the defendants, or of defendants' to any obligation to complainant sought to be enforced in the original suit, or of defendants' acquisition of, or succession to, any estate or interest of or

under any defendant in the original suit. Nor is there any allegation of any change whatever in the title, possession or condition of the property involved in the Utah suit, or of any attempt to interfere with it.

It is alleged that the defendants "caused to be "published" a certain advertisement in the New York Herald; and the text of the advertisement no doubt states that the defendants had given a guaranty to their vendees of the common stock, and sought an indemnity from their customers against that guaranty. But there is no allegation whatever *in the bill* that any agreement was made by the defendants. So the bill alleges that the defendant, George Foster Peabody, *said* that the fund to be created out of the defendant's sale of the shares was to be left in their control, "to be "held in trust as a greater assurance that if com- "plainant's claim should be established it will be "paid." The allegation that Mr. Peabody *said* such and such a thing was no allegation of an agreement constituting a trust fund. What Mr. Peabody said in an affidavit in the Utah suit does not make, or serve to allege, an agreement.

But assuming, however, that the various matters stated in the defendants' advertisement and picked out of Mr. Peabody's affidavit are to be considered as original and direct allegations of this bill, nevertheless the utmost that can be inferred is this: That long after the complainant's cause of action arose,—indeed, very many years after,—the present defendants sought to make a sale of shares of stock of the Western Company

belonging to them and their clients; that at the time of making such sale they, and those who were to purchase the shares, found pending against the Western Company a suit brought in Utah upon the complainant's claim in which it was theoretically possible that a large recovery might be had against the Company; that the present defendants thereupon guaranteed the purchasers of such shares of stock against the loss to which *they*,—the purchasers,—would be put in case such claim were established, that is to say, against the injury to the value of their shares which would result from a judgment against the Company; and that, as a condition to permitting other stockholders to join in the sale, the defendants required them to assume their share of the guaranty against damage which the defendants had given the proposed purchasers.

Such is the utmost which it can be said that the present bill alleges or suggests. But such an agreement was in no way ancillary to any agreement between the complainant and the Western Company. It was not made in favor of that Company or of the complainant. If the complainant's claim against the Company were valid, it had to be satisfied before any stockholder of the Company could receive anything upon his shares. No stockholder could sell a share of stock except subject to that claim as well as to all other debts or obligations of the Company. The shifting from one ownership to another of one share or all the shares of the Company would not and could not affect in any imaginable way the validity of the claim.

The complainant's claim was not against the stockholders of the Company, but against the Company. No claim against the stockholders was asserted in the Utah suit, or is asserted here. The appellant's contention here is nothing less than this, that a creditor, or a person alleging himself to be a creditor, of any corporation, may, in advance of recovering any judgment upon his claim or other judicial recognition of it, enjoin sales, purchases, or dealings in the shares of its capital stock.

The complainant's supposed cause of action is obviously one arising out of an agreement between the defendants, who were not parties to the original suit, and the vendors of the common stock, who also were not parties to the original suit. The reality or validity of such supposed cause of action must depend upon the nature of that agreement between persons not parties to or interested in the original cause of action. The mere fact that the recovery of a judgment in the original Utah action is an indispensable ingredient to the supposed cause of action against the defendants here, neither makes nor helps to make the present bill other than an original one (*Christmas* v. *Russell*, 14 Wallace, 69). A supplementary or ancillary bill, or any bill not original, must not present a new cause of action but present new facts relevant and material to an adjudication of the original cause of action. (*Story on Equity Pleading*, sect. 339).

The appellant lays hold of the argumentative language of Mr. George Foster Peabody's affidavit in opposition to the complainant's motion for a

receiver in the Utah cause. The Court will perceive, on reading the affidavit, that the use which the appellant would make of it is a sheer perversion. Upon that motion, after it had been argued, the complainant produced the advertisement of Spencer Trask & Co. which appears in the bill. To this Mr. Peabody said in his affidavit that he was advised that the provision made for the protection of Spencer Trask & Co. against the guaranty which they had given the proposed purchasers of the stock was "a fact against and not in "favor of the complainant's motion as it gives a "greater assurance that if the complainant's claim "shall be established, it will be paid." An important question upon the motion was whether there were danger that, if complainant established his claim, the Western Company would be able to respond. Obviously what Mr. Peabody meant was that the indemnity which his firm was giving the purchasers from it of the common stock against the claim of the complainant and the indemnity which in turn his firm was taking for its own protection, made it not less likely, but more likely, that the complainant's claim, if established, would be paid. The fact that, if it were established, Spencer Trask & Co. would be liable in case the Company did not pay it, increased,—not diminished,—the probability that the claim, if valid, would be paid. So Mr. Peabody's statement that the "*result* of this provision" (that is to say the provision for indemnity) was that any just claim of the complainant was secured not only by the assets of the Western Company, but

by a special amount to be held in trust by Spencer Trask & Co., obviously meant no more than that the guaranty which the firm had given, and the indemnity which it had taken, operated as additional practical assurances that the complainant's claim, if it were valid, would be paid, and that in view of the great probability that the complainant's claim would be met if it were established, a receiver ought not to be appointed.

III.

The decree should be affirmed with costs.

New York, April 12th, 1904.

Edward M. Shepard,
Wm. Mason Smith,
of Counsel for Appellees.

SUPREME COURT

No. 3

MARTHA HATHAWAY, Administratrix
of NATHANIEL W. HATHAWAY, Deceased,

vs.

SPENCER CHASE, GEORGE
EDWIN M. BULKLEY, CHARLES
and AGNETA NICHOLS,

Appellees.

SUPPLEMENTAL BRIEF FOR
APPELLEES.

EDWARD M. [illegible],
Counsel for the Appellees.

Judd & Detweiler, Printers, Washington, D. C.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 229.

MARTHA RAPHAEL, ADMINISTRATRIX OF THE ESTATE OF NATHANIEL W. RAPHAEL, DECEASED,

APPELLANT,

versus

SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, CHARLES J. PEABODY, AND ACOSTA NICHOLS,

APPELLEES.

SUPPLEMENTAL MEMORANDUM FOR THE APPELLEES.

As the appellant's counsel did not file his brief pursuant to the rule, and the counsel for the appellees has first seen the appellant's brief while in attendance here for the argument, permission is asked to submit a brief Memorandum in Reply.

The appellant declares that the complainant's bill was filed "to stay waste." This is the first suggestion that we have yet heard or seen in this case that it involves any such ques-

tion. No threatened waste of the spurs of railroad included in the Utah suit is even suggested in the bill. None was mentioned in the court below. That the Rio Grande Western Railway Company was likely to injure the property while in its possession was not hinted. On the contrary, the record discloses that that company had been at great expense in improving the property. The railway company is not a party to this suit. It was not alleged, nor is there the pretense of a claim that the present defendants are in any control of the railroad, or that their interest was anything more than that of holders of portions of the common stock of the railroad. The spurs of railroad involved in the Utah suit are no part of the subject-matter of this suit.

The appellant's counsel in his own statement, at page 6 of his brief, declares:

> "That the *only object of the suit* is to subject the *said* "*fund* to the control of the court pending the suit in "Utah, and that it is believed the rights of the said "Raphael as complainant and all the interests of the "appellees as members of said firm can be litigated "and determined in an action against the remaining "appellees, Spencer Trask, George Foster Peabody "and Acosta Nichols without joining as defendants "the said non-residents Edwin M. Bulkley and "Charles J. Peabody."

The appellant has correctly stated the purpose for which the complainant's bill was filed and the only imaginable cause of action set out. A suit to restrain waste would have been filed against the company in possession and control of the mortgaged premises and the alleged surplus earnings,

or possibly against its officers and directors, but certainly not against mere holders of such company's stock.

The authorities cited by the appellant not only do not support his contention but illustrate its unsoundness.

Erhardt v. Boaro, 113 U. S., 537.—There had been an original suit to recover mining property. The plaintiff in that suit filed a supplemental or ancillary bill, alleging that the defendants, being wrongfully in possession, were removing the ore and therefore wasting the property, and obtained against the defendants in that suit an injunction to prevent such waste. The injunction suit seems to have been in the same court as the action to recover possession.

Marshall v. Turnbull, 32 Fed. Rep., 124.—The bill was filed for foreclosure of the mortgage, and the question litigated was whether on a motion for a preliminary injunction upon allegations that the defendants were wasting the actual property involved in the same suit, before the same court, the court would enjoin them.

Pacific Railroad v. Missouri Pacific Co., 111 U. S., 505.—This was a suit to set aside a foreclosure as collusive and fraudulent. It was brought in the same court, and the additional parties brought in were those who had acquired some real or apparent right to the property under the decree. Therefore it was that this court held that—

> "the bill, though an original bill in the Chancery "sense of the word, is a continuation of the former "suit on the question of the jurisdiction of the circuit "court."

In addition to the authorities upon our brief, we respectfully refer the court to the note on ancillary suits in 36 C. C. A., 195, where a classification of such suits is to be found, and

especially to the decision of the circuit court of appeals of the fifth circuit, rendered in 1894, in *Anglo-Florida Co. v. McKibben*, 65 Fed. Rep., 529, where, upon a state of facts much more favorable for the claim of ancillary jurisdiction than the present case, the court decided that the bill was (p. 530)—

> "not in any proper or legal sense a supplemental or "ancillary bill and that the jurisdiction of the court "cannot be maintained on that ground."

EDWARD M. SHEPARD,
WM. MASON SMITH,
Counsel for the Appellees.

WASHINGTON, MONDAY, APRIL 18, 1904.